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Schaber, Peter

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# Human rights without foundations?

PETER SCHABER

Different authors such as Charles Beitz and Joseph Raz argue against what they call ‘the traditional view’ of human rights: the view that there are universal human rights based on essential features of human beings. Human rights, they think, are rights with a certain political function, namely to limit the sovereignty of states. In his paper “Human Rights without Foundations” Joseph Raz calls this “the political conception of human rights” (Raz 2010, 328). The political conception is, Raz argues, closer to contemporary human rights practice than the traditional views. According to Raz, the traditional views provide us with conceptions of human rights that are so remote from the current practice of human rights “as to be irrelevant to it” (ibid., 323). This, Raz thinks, speaks against the traditional view or what might also be called the moral view of human rights and in favor of the political view.

My paper will deal in the first part with this political conception of human rights; I will argue that we should not accept this view for different reasons: it does not pass the adequacy test it sets out for a satisfactory theory of human rights, and it does not provide us with the justification of human rights that we need. I will then, in the second part of the paper, try to show how the traditional or moral view of human rights could be defended.

## 1. The political conception of human rights

What does the political conception of human rights amount to? Its basic idea is that human rights should be seen as a class of rights that limit a state’s internal autonomy. Human rights violations are reasons for outside intervention. As Raz puts it:

“Sovereignty does not justify state actions, but it protects states from external interference. Violation of human rights disables this response [...]” (ibid., 328)

These rights need not, Raz thinks, be based on certain essential, and one might add, important features of human beings. Some of them, it is argued, are based on contingent non-evaluative facts about humans, for instance the fact that the economic and social structure of a society leads people living in this society to value certain things. And as a consequence, they do not need to be universal. Human rights are not rights human beings have in virtue of their humanity. Rather they have these rights for political reasons: Human rights are taken to be of *international concern*, for whatever reasons people think they should be seen this way. People have reasons to see these rights as of international concern. But they are not human rights due to these reasons, but rather due to the fact that they are taken to be of international concern.

This account of human rights, Beitz and Raz think, gets us closer to the reality of the current human rights practice. And this is, they think, one of the reasons why this account should be accepted. A satisfactory theory of human rights has to account for the actual human rights practice. And this is exactly what the political conception does, they argue:

“The dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against violations in the international arena [...]” (ibid., 328)

Intervention justified by human rights violations are taken by Raz in a wide sense, including not just military intervention, but milder forms such as “making conformity to rights a condition of aid, calling on states to report on their [...] protection of human rights, condemning violation, refusing to provide landing or over-flight rights, trade boycotts, and others” (Raz 2007, n. 14).

## 2. Accounting for human rights practice?

One might question the idea that a theory of human rights has to account for the current human rights practice. But even if we accept this as an adequacy test for a satisfactory theory of human rights, we have no good reasons to accept the political conception of human rights.

Let me explain. If we take a closer look at the UN Declaration of Human Rights, we find a very long list of different human rights, a list that has been developed over the years, influenced by different political concerns as well (for example, to get the socialist countries on

board). The idea of outside intervention is a rather new development, still at an early stage, mainly based on the terrible experiences of the international community with non-intervention in the face of genocide, mass rape and other crimes against humanity, as it was the case, for instance, in Rwanda in 1994.

The list of human rights is indeed long. Nevertheless, very few violations of human rights are taken as reasons for intervention, even if 'intervention' is understood in a very wide sense. I am thinking not just of the famous right to have periodic holidays with pay, but also other and definitely more important rights such as the right to work, the right freely to participate in the cultural life of the community, the right to enjoy the arts, the right to political participation and the right of peoples to freely dispose of their natural resources, as stated in Article 1 of the International Covenant on Civil and Political Rights.

The violation of none of these rights is taken as a valid reason for any kind of intervention. Just take, for instance, the right of peoples to freely dispose of their natural resources. Corrupt and incompetent regimes violate this right without doubt in many different ways (see Wenar 2008). Nevertheless, the international community is not bothered about this. The way the regimes of these countries use the resource wealth is still considered a purely internal matter. And I think that this applies to all the rights I have just mentioned: to the right to work (which does not exist in our Western countries), the right to participate in the cultural life, the right to enjoy the arts. If at all, the international community intervenes – even if we take 'intervention' in a wide sense – only if basic human rights are violated on a massive scale. It is true that there has been more talk about outside intervention in recent years, but it normally refers to these basic rights. It does not seem to be the case that the political conception really gets us any closer to the contemporary human rights practice than the traditional view. It does not seem to pass its own adequacy test.

Still, one could hold the view that human rights *should* be understood as rights that serve a political function, namely to limit the sovereignty of states. One could argue that this is the way they should be taken in the future; and perhaps we are slowly moving in this direction. But then the question arises which rights violations should be seen as reasons for limiting state sovereignty. The UN report "The Responsibility to Protect" mentions genocide, ethnic cleansing, and exposure of the population to mass starvation as valid reasons for military intervention (International Commission 2001, 33). What, if anything, should

we add? Just all human rights we find in the UN Declaration? And just because they are found there? Is the reason the violations of these rights allow for intervention just that they are accepted as human rights, whatever their justification might be? But then we are faced with the question: Why should human rights be taken as rights that limit state sovereignty? What is it about them that makes them so important? I take it that this has to be justified, that we indeed need good reasons for limiting state sovereignty, the internal autonomy of a community. I cannot see what the political conception could tell us here.

Charles Beitz argues in his book “The Idea of Human Rights” that the current human rights practice has a certain normative authority: his approach “claims for the practice a certain authority in guiding our thinking about the nature of human rights” (Beitz 2009, 10).

But why should one accept this? Beitz gives us two reasons for accepting this: a) “the practice [...] consumes a considerable amount of human and other resources, and people tend to regard its norm with great seriousness” and (b) the second reason is “that we have *prima facie* reason to regard the practice of human rights as valuable” (ibid., 11).

I do not see why we should see the fact that people take the official human rights with great seriousness as a reason for the normative authority of the practice. It is not the fact that people regard things with great seriousness that provides them with a normative authority; it is rather that there are reasons why things should be taken with great seriousness which provide them with normative authority.

As regards the second point: Of course, the practice of human rights is valuable, but again I cannot see why this should be seen as a reason for assigning normative authority to the current practice. The practice is valuable, because or insofar as the right things are done. Preventing governments from torturing political opponents, from putting people in prison without a fair trial, from treating people in degrading and inhuman ways, is without a doubt valuable. That it is valuable means: It is what has to be done, it is about protecting rights that have to be protected. The human rights practice is valuable insofar as this is the case.

### 3. Non-evaluative facts

Raz doubts whether all human rights can be justified – as some philosophers think – only by non-contingent evaluative facts about human beings (Raz 2010, 335). And, he thinks, in so far as this is impossible, human rights are not universal rights, rights humans have in virtue of them being human. I guess that this is one of the central ideas of a political conception of human rights. Let me consider two reasons for doubting that all human rights are universal rights based on non-contingent evaluative facts about humans:

a) The first reason has to do with the fact that the human rights we have, as Charles Beitz puts it, “bear on nearly every dimension of a society’s basic institutional structure, from protection against misuse of state power to requirements for the political process, health and welfare society and levels of compensation for work” (Beitz 2003). They are not best interpreted as securing the minimal conditions of any decent human life or, so one could add, they are not best interpreted by any other single comparable justificatory idea.

b) The second reason has to do with the fact that some human rights, it is argued, can only be established by contingent facts about people. The rights people are supposed to have depend, as Raz thinks, on the social and economic structure of a society, enabling people living in these societies to *value* these rights. Others living in societies with different social and economic structures are not able to value the same rights. And if this is the case, that is, if the same rights are not valued by people due to a given economic and social structure, it is wrong to assign to people living in these societies the same rights, Raz suggests. “Typically rights are established by arguments about the value of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and to promote them” (Raz 2010, 335). Raz thinks that the right to education is a good example: “Whether education [...] is needed to meet that individual interest is itself a contingent matter” (ibid., 336). It depends on the conditions in which people find themselves.

So the first problem has to do with the diversity of human rights, the second with the diversity of what is valued by people due to certain contingent facts.

As regards the first problem: The officially recognized human rights indeed touch on different matters. But it is not clear what follows from this for the justification of human rights. Even if they are concerned

with very different matters: why should they all be taken as human rights? They might not be based on just one basic non-contingent feature of human beings. But still, they need a justification different from just saying that certain rights are taken to be human rights or taken to be, as Beitz puts it, “standards appropriate to the institutions of modern [...] societies coexisting in a global political economy in which human beings face a series of predictable threats” (Beitz 2003, 44).

Why should they be seen as standards appropriate to the institutions of modern societies? And why should they be seen as of international concern? We need an answer to these questions that goes beyond the reference to the common human rights practice. And this holds no matter whether such an answer refers to different justificatory ideas or just one.

As regards the second objection: Indeed, certain rights can only be implemented if certain social conditions are fulfilled. The realization of a right to education depends on the existence of certain institutions (schools, universities). Raz thinks that education is only of value to people if these institutions exist. It might indeed be the case that education is not actually valued by people living in such a society, but education might nevertheless be of value to them. If so, they have reason to set up those institutions. If education is an essential aspect of their life, it should be protected by rights, independently of whether it is actually valued by people or not.

In any case, the institutional background conditions for the realization of rights are not the reasons for ascribing the rights concerned: It is not that people have a right to basic education because there is an established educational system. They have such a right, provided that this protects an essential aspect of a human life. As I will argue below, rights protect people’s normative authority over essential aspects of their lives. In a society where functioning educational institutions do not exist, this aspect of the normative authority over oneself might not be valued by people. But education could nevertheless be valuable to them, and if this is the case, people have reasons to build up educational institutions. And I think that people have a right to education, provided that this right protects people’s ability to exercise their normative authority. I will come back to this point in section 6.

#### 4. Universal acceptance?

Human rights are rights, Charles Beitz tells us, “of international concern” (Beitz 2009, 23). This is what he thinks human rights amount to. But then, as stated above, this claim needs to be justified: Why should human rights be of international concern? Defenders of the political conception of human rights have doubts whether such a justification of human rights can be given, that is, whether we can justify human rights in a way that is acceptable to all. And indeed, it is questionable whether a Kantian or a utilitarian or any other justification will ever be acceptable to all, given the different cultural environments people live in.

There is a unifying concept to be found in the official human rights documents. The final declaration of the second International Conference of Human Rights in Vienna, which has been signed by 197 states, says “that all human rights derive from the dignity and worth inherent in the human person” (see Clapham 2006, 539). But then, one could say, any interpretation of the term ‘dignity’, a term which is no doubt in need of interpretation, will definitely be contested.

This is taken by the defenders of the political conception as a reason not to be too worried about a justification of human rights. There are many different justifications of these rights; the essential thing is, they think, that we agree on a list of human rights that we take with great seriousness. But this idea mixes the political and the moral view of human rights. From a political point of view it is important that the official human rights, or at least the essential ones, are taken seriously and that they are accepted by the majority of states. From a political point of view we should not worry why a government respects the right not be tortured, for instance, whether they do this for certain religious or for Kantian or for utilitarian reasons. Who cares? The essential thing politically is that states respect this and other human rights.

But I think that things look different from a moral point of view. The fact that no justification will ever be acceptable for all cultures does not mean that there is no valid justification of human rights. Moral issues are not decided by democratic votes. A moral view is not wrong because it is not accepted by most people. If people have human rights, they have it for certain reasons. There are reasons for calling certain rights human rights and for giving them a special normative status. There are reasons why certain rights should be seen to be of international concern, as Beitz puts it. We need to find out what these



reasons are. We have to do this not just with regard to the intervention issue, but also in order to be able to determine which rights are human rights, that is, which rights are rights of international concern; why they are of international concern and why they are so important.

## 5. Humanity

But how could rights be established as human rights? A natural and widespread thought is that humans have these rights *in virtue of their humanity*. Human rights are those rights they have insofar as they are humans. But this needs to be explained. Why should being human be a reason for having rights? What is morally important about being human? The term ‘humanity’ might refer to some non-evaluative and at the same time non-contingent facts about human beings such as, for instance, that they are capable of acting for reasons. But could this fact provide us with a reason for assigning rights? The only right which could follow would be the right that protects the capacity to act for reasons. But how do we get from this to human rights such as the right not be tortured or not to be the object of degrading treatment or punishment or the right not be discriminated against? These rights do not protect the capacity to act for reasons. That is to say, people have a right not be tortured, but not because torture would threaten the capacity to act for reasons. Victims of torture are capable of acting for reasons, and the same is true of people who are subjected to degrading treatment as well as the victims of discrimination.

But probably the terms ‘humanity’ or just ‘human’ should be understood in a different way. James Griffin thinks quite rightly that the word ‘human’ refers to the concept of agency, and more precisely to the concept of “normative agency” (Griffin 2008, 45): He talks about “the view that normative agency is the typical human condition” (ibid., 45). Humans act for reasons against a background of what they see as a good life, that is, a conception of a worthwhile life. Hence it is suggested that human rights protect people’s ability to pursue what they see as a worthwhile life. They do not protect a worthwhile life, but rather the ability to shape one’s life according to one’s own idea of a worthwhile life.

But again, how do we get from here to the right not to be tortured, the right not to be discriminated against? Victims of torture and discrimination still have the ability to pursue their conception of a

worthwhile life. It is obviously something else that is protected by the right not to be tortured as well as by the other rights mentioned, for instance, the right not to be discriminated against.

Griffin probably takes normative agency to mean not being dominated or controlled by others, as is certainly the case when a person is tortured. The right not to be tortured, one could argue, is based on the fact that we attach a high value to this essential aspect of agency. And it has been argued that this might be the point of human rights: to protect what we consider to be very valuable. But the fact that something is valued by people does not lead to a corresponding right protecting the valued object. I might value getting a higher salary, but this definitely does not establish a right to get one. It is also not a question of attaching a *high value* to something. Being able to get a certain position at the university might have a high value for me, but it does not establish a right to get the position.

One might say that rights are not based on the fact that certain things are valued by us, but rather on the fact that certain things *are* valuable for us. They protect, one might say, basic aspects of what is valuable to us. The normative fact is not that those things are valued by persons, but rather that they *are* valuable for them. But do such normative facts generate rights, human rights? Not everything that is valuable for us does: To get a certain job might be of high value to me, but this does not establish a right to get the job. The account of what is of value for us must be more specific in order to lead us to rights. We might have any kind of reason not to destroy, to protect and probably also to promote what is valuable for people. Values provide us with reasons, but rights do more, they provide us with duties. What generates the duties that correspond to human rights?

## 6. A basic right

It might be a *basic moral right* that generates universal human rights. First of all, the justification of human rights can only be done by normative facts. Reasons to ascribe rights are provided by things that are valuable, important or themselves rights. A basic right would be a normative property people have, and in addition a normative property that is able to provide us with reasons for rights. But which basic moral right could serve this role?

It might be helpful to have a look at official human rights documents. As I've already said, the declaration of the second World Conference on Human Rights 1993 in Vienna states "that all human rights derive from the dignity and worth inherent in the human person". The preamble of another human rights treaty, the International Covenant on Civil and Political Rights, also tells us that all rights of the Covenant derive from the inherent dignity of the human person. Thus, inherent dignity might be taken as such a basic moral right on which all other human rights are based. The concept of dignity, of course, needs explanation. What does inherent dignity mean?

One could say that it means something that is violated when people are subjected to cruel, inhuman or degrading treatment. The victims are treated as if they did not count, that is, as if they had no say over what is done to them. Inhuman and degrading treatment of people amounts to denying that they have their own normative authority, which might just be the basic right people have. Inherent dignity might be taken as having *normative authority* over essential aspects of one's own life, provided that this is what paradigmatic violations of human dignity such as inhuman and degrading treatment amount to.

But what does it mean to have such a normative authority? It means being authorized to stand up for certain things: to be treated or not treated in certain ways. It also means having a say in deciding your own destiny, having a say as far as it is in your power to determine what happens to you. Thus, it is the right to decide for yourself concerning what is done with your own body and mind. It is the right to decide what job you're going to have, with whom you are going to live, whom you will get married to, what books you are going to write, etc.

Normative authority also includes the right to exclude others from using your person for their purposes. It is also the right to authorize others to do to certain things with you. Respecting people's normative authority is, one could say, respecting their right to be a sovereign person. Acts of humiliation, degradation or torture violate this sovereignty of people. When humans are humiliated, they are treated as if they did not count, as if they could be used at will.

## 7. Deriving human rights

Recognizing that others have a normative authority over their lives has certain normative implications: It provides us with reasons to assign further rights to humans. If I have a normative authority over myself, I also have the right to exercise my normative authority. Thus, I have rights to those goods and capacities that are required to do so. I have the right to use my body and mind the way I want to use them. And I'm able to do this if I have options. Thus, in order to exercise my normative authority, I need options. But I think I need more than just any options: What I need are *acceptable options*: that is, options I have reason to choose. If you are faced with options you have no reason to choose, that is to say, you would never choose if you were not forced to, you are not choosing. If I have a right to exercise my normative authority over my life, I also need rights which protect acceptable options: Rights protect the options people have. My right would remain unfulfilled if I had no acceptable options. This would be the case, for example, if I had to live a life in absolute poverty. My right over myself could not be exercised. If I have a right to exercise my normative authority, I can demand of others to provide me with acceptable options. Thus, dignity provides us with reasons to assign further rights, namely all those rights required to protect options we need to exercise the basic moral right which I take to be what inherent dignity means: to have normative authority over oneself.

Different human rights protect the normative authority of people: the right to liberty and security, the right not be held in slavery or servitude (Article 4 of the Universal Declaration of Human Rights), the right not to be tortured and degraded (Article 5), the right to freedom of thought, conscience and religion (Article 18), the right to freedom of opinion and expression (Article 19) and others. The normative authority is also protected by social human rights such as, for instance, the right to an adequate standard of living (Article 25) or the right to basic education (Article 26). The normative authority over essential aspects of one's life can only be exercised if one has access to basic goods as well as to the development of basic capacities. Thus, a normative authority over oneself as a basic moral right could lead us to other rights we have as humans. Of course, the idea of a basic moral right to have normative authority over essential aspects of one's own life needs to be elaborated in a way which cannot be done here. But I think it is a way worth pursuing: to base human rights on a basic moral right of persons, namely the right

to have a normative authority over essential aspects over one's own life, that is, the right to be an independent being and recognized as such.

In taking this path, we should not be worried by the political aspects of human rights: whether they are universally accepted, whether they guide the current human rights practice. Human rights might be about respecting the basic moral right to have and to exercise your normative authority. This might in the end lead us to a theory of human rights that could explain why human rights are so important, and even "why", as Raz puts it, "all and only such rights should be recognised as setting limits to sovereignty" (Raz 2010, 334) and thus why they should be respected by all governments. I do not know whether all rights we find in the Universal Declaration can be justified by reference to this basic moral right. Some of them might not be justified this way; but then, it could well be the case that some of the official rights should as a matter of fact not be seen as human rights. But I think it is a promising way of providing us with reasons for establishing rights of international concern, that is, rights we all have to care about. This would be a traditional or moral theory of human rights and not a political one.

### *Bibliography*

- Beitz, Charles (2003): What Human Rights Mean. In: *Daedalus* 132 (1), 36–46.
- Beitz, Charles (2009): *The Idea of Human Rights*. Oxford: Oxford University Press.
- Clapham, Andrew (2006): *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press.
- Griffin, James (2008): *On Human Rights*. Oxford: Oxford University Press.
- International Commission on Intervention and State Sovereignty (ed.) (2001): *The Responsibility to Protect. Report of the International Commission on Intervention and State Sovereignty*. Ottawa: International Development Research Centre for ICISS.
- Raz, Joseph (2007): *Human Rights without Foundations*. In: Oxford Legal Studies Research Paper No. 14/2007. Available at: < <http://ssrn.com/abstract=999874> >.
- Raz, Joseph (2010): *Human Rights without Foundations*. In: Besson, Samantha/Tasioulas, John (eds.): *The Philosophy of International Law*. Oxford: Oxford University Press, 321–338.
- Wenar, Leif (2008): Property Rights and the Resource Curse. In: *Philosophy & Public Affairs* 36 (1), 2–32.